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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09,939,237	08/24/2001	Raul Victorino Nunes	8270	3412

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EXAMINER

PRATT, HELEN F

ART UNIT

PAPER NUMBER

1761

DATE MAILED: 07/11/2003

Please find below and/or attached an Office communication concerning this application or proceeding.

# Office Action Summary

Application No.

09/939,237

Applicant(s)

NUNES ET AL.

Examiner

Helen F. Pratt

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

## Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

## Status

- 1) ☐ Responsive to communication(s) filed on \_\_\_\_.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

## Disposition of Claims

- 4) ☒ Claim(s) 1-27 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-27 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_ are subject to restriction and/or election requirement.

## Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- 11) ☐ The proposed drawing correction filed on \_\_\_\_ is: a) ☐ approved b) ☐ disapproved by the Examiner.  
If approved, corrected drawings are required in reply to this Office action.
- 12) ☐ The oath or declaration is objected to by the Examiner.

## Priority under 35 U.S.C. §§ 119 and 120

- 13) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).  
a) ☐ All b) ☐ Some \* c) ☐ None of:  
1. ☐ Certified copies of the priority documents have been received.  
2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_.  
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).  
\* See the attached detailed Office action for a list of the certified copies not received.
- 14) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. § 119(e) (to a provisional application).  
a) ☐ The translation of the foreign language provisional application has been received.
- 15) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121.

## Attachment(s)

- 1) ☐ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☒ Information Disclosure Statement(s) (PTO-1449) Paper No(s) \_\_\_\_
- 4) ☐ Interview Summary (PTO-413) Paper No(s) \_\_\_\_
- 5) ☐ Notice of Informal Patent Application (PTO-152)
- 6) ☐ Other: \_\_\_\_\_

## DETAILED ACTION

### *Claim Rejections - 35 USC § 102*

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(a) the invention was known or used by others in this country, or patented or described in a printed publication in this or a foreign country, before the invention thereof by the applicant for a patent.

Claims 1-3 are rejected under 35 U.S.C. 102(a) as being anticipated by Glaceau Vitaminwater.

Vitaminwater discloses a composition as in claims 1, 2, 3, containing zinc, arabinogalactan, vitamin C, electrolytes such as calcium magnesium and potassium (product page). The date of this product is March 12, 1999, according to their Trade Mark.

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

Claims 1-4, 7, 8 are rejected under 35 U.S.C. 102(b) as being anticipated by Fuse et al. JP 2-154,673 (cite no. 14).

Fuse et al. disclose as in claims 1-4 a drink containing arabinogalactan from the Larch tree in amounts from within the claimed range and vitamin C, or B vitamins with at least 50% water as in claim 7, and vitamins B and C as in claim 8 in within the claimed amounts (Page 2, 2<sup>nd</sup> para. , page 7, Ex. 1. , Ex. 3 ).

Claims 1, 2, 17, 18 are rejected under 35 U.S.C. 102(b) as being anticipated by McAnalley.

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McAnalley discloses a composition as in claims 1 and 2, and 17, which can be in liquid form and is therefor considered to be a beverage which contains arabinogalactan and vitamins A, B, C, D, E and is within the claimed ranges as in claims 2 and 18 (page, 18, lines 1-18, page 19, lines 9-15, page 30, lines 14-18 and page 14, lines 16-20).

***Claim Rejections - 35 USC § 103***

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 1-27 are rejected under 35 U.S.C. 103(a) as being unpatentable over Celestial Seasonings Echinacea Complete care (CS) or Vitaminwater or Odwalla Introduces Glorious Morning in view of McAnalley (WO 98/06418) and also taken alone and Fuse et al.

CS discloses a composition containing arabinogalactan (AG) and vitamin C and zinc. Claims 1, 2, 3 differ from the reference in that the composition is to a beverage. However, the reference discloses as much as claimed as far as ingredients and a beverage is no more than a drinkable liquid according to the dictionary. No water is even seen in the claimed composition. Vitaminwater has been discussed above as to claims 1-3 and is a beverage as has Fuse et al. as to claims 1-4, 7 and 8. McAnalley disclose a composition containing AG and vitamins which can be in the form of a liquid whose limitations as to claims 1-5 have been discussed above (abstract and page 19,

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lines 10-15, page 14, lines 16-17, page 30, lines 14-18). Therefore, it would have been obvious to make a composition as claimed and to use the claimed ingredients in a liquid form such as beverage as disclosed by McAnalley.

Claims 3 and 19 further require that the AB is from .001% to 15 of the composition and from the genus Laris as in claims 4 and 20 and is a dry composition as in claims 5 and 21. McAnalley discloses that the composition can be in a dry formulation, from the Larch tree (page 14, lines 16-20, page 8, line 10). The particular amount of AB is seen to have been within the skill of the ordinary worker depending on the degree of viscosity required. Therefore, it would have been obvious to use the claimed amounts of ingredients and a product from the genus Laris and a dry formulation as claimed.

Claims 6, 8, 9, require particular amounts of the vitamins in the composition and claims 11-16 require particular combinations of vitamins. However, it is seen that it would have been within the skill of the ordinary worker to use particular amounts of ingredients particularly as the reference discloses the use of nutritionally acceptable forms (page 14, lines 3-9). Nothing new is seen in the various forms of the vitamins which are disclosed by McAnalley except for E acetate as in claims 16 and 27. However, this is a well known form of the vitamin and nothing new is seen in its use absent unexpected results in this formulation. Therefore, it would have been obvious to make a composition containing the claimed AB and vitamins in the claimed amounts.

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The further amounts of vitamins as in claims 22, 24, 25 are seen to be within the skill of the ordinary worker depending on the degree of nutritional fortification required as is amount of water which depends on the viscosity of the beverage.

The particular pH as in claims 10, and 26 is seen to be shown by McAnalley because nothing is seen to make the composition more than a pH of 7 (page 19, lines 9-15). Also Fuse et al. disclose a composition of 4-4.5 (page 5, 4<sup>th</sup> paragraph). Any further limitations have been discussed above and in the 102 rejections. Therefore, it would have been obvious to make a composition with a pH within the claimed range.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Helen F. Pratt whose telephone number is 703-308-1978. The examiner can normally be reached on Monday to Friday from 9:30 to 6:00.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Mr. Milton Cano, can be reached on (703) 308-3959. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9706.

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is 703-308-0651.

Hp 7-8-03

*H. F. Pratt*  
HELEN PRATT  
PRIMARY EXAMINER